They may weigh the cost and the difficulties of the precautions. They are in general entitled to assume that others will comply with statutory regulations...."

See also the Federal Court case of *Hamzah D.494 & Ors.* v. *Wan Hanafi bin Wan Ali.*(1)

Despite denials by the second defendant and his witnesses that they had ever heard of accidents of this particular sort taking place in rubber milling operations it seems to me that it is one of rather obvious dangers of such work. The provision of goggles or eye-guards of some sort does not appear to me an extravagant protection nor would it be expensive.

I therefore find that the second defendant is liable at common law for negligence in not providing adequate safeguards, and in the absence of evidence of contributory negligence by the plaintiff, I would hold him to be fully liable.

As regards damages for loss of an eye, I was referred to the case of *Jenny Yu & Anor.* v. *Pool & Anor.*(2) where the sum awarded was $18,000.

In *Wee Kim Swee* v. *Cheong Aik Meng,*(3) a Singapore award made in 1964 — $12,000 was awarded. There though there was only 80% loss of vision, the eye was likely to become worse. But, in addition to the eye injury there was also fracture of the infra orbital region.

In another Singapore award of 1962 — *Peck Hock Ser* v. *The Green Bus Co. Ltd.,*(4) $12,500 was awarded for injury to left eye whereby vision was limited to counting fingers at one metre only.

In 1968, Gill J. (as he then was) awarded $12,500 for loss of vision of one eye — *Shamsudin* v. *Yap Choh Teh & Anor.*(5)

Taking into account the depreciation in value of money since the last mentioned award, and the higher trend of the Singapore award, I feel that a sum of $15,000 for loss of sight in one eye is not over much, and I would accordingly award such sum, special damages (loss of earnings for 56 days at $4.20 per day — March 5, 1969 to April 29, 1969) *i.e.* $235.20, and interest on the aggregate sum from March 6, 1969 until date of realisation at 6% per annum. Plaintiff's costs to be paid by second defendant. First defendants' costs also to be paid by second defendant directly.

Order accordingly.

Solicitors: *Joseph & Son; Syarikat Atma Singh Gill & Gill; Shearn Delamore & Co.*

RE CHOE KUAN HIM, ADVOCATE & SOLICITOR; T. DAMODARAN v. CHOE KUAN HIM

[O.C.J. (Syed Agil Barakbah J.) July 14, 1975]
[Alor Star — Originating Summons No. 677 of 1974]

Practice and Procedure — Written undertaking by advocate and solicitor — Whether given by mistake — Advocates & Solicitors Ordinance, 1947.

Legal Profession — Advocate and solicitor — Written undertaking — Liability.

The applicant, a registered owner of several pieces of land, entered into a sale agreement with one Andavan who on March 6, 1974, assigned the said land to United Realty Sdn., Bhd., the purchaser. In the course of the transaction the respondent in his capacity as solicitor for the purchaser issued a written undertaking of the same date which was duly received by the applicant.

In the written undertaking the respondent undertook to release the balance of the purchase price to the applicant "upon the transfer of the said lands being duly registered....". On registration of the said lands, the respondent paid part of the purchase price to the applicant in cash and the balance thereof amounting to $182,000 in cheque. Payment of the said cheque was stopped by the respondent.

The issue for determination was whether the respondent was bound to pay the said sum of $182,000 on the strength of his written undertaking as a solicitor.

Held: (1) an undertaking given by a solicitor is very often the decisive factor in inducing its acceptance. Great care ought therefore to be paid to the wording of an undertaking both by the solicitor giving it and by the person accepting it;

(2) the fact that subsequent to the undertaking events occur which alter the position, such as his client withdrawing or changing his instructions before the undertaking has been honoured, will not entitle the solicitor to avoid liability unless he has expressly guarded against those events in the undertaking itself;

(3) the standard required is so high that the courts have allowed only one defence, that of mistake;

(4) as a solicitor, the respondent ought to have foreseen the consequences of such failure. He cannot turn back and say he was acting on the instructions of his client. He is the stakeholder and therefore bound by his undertaking;

(5) in the circumstances of this case in view of the fact that there was a pending civil action in which the applicant and the purchaser were involved, the respondent would be ordered to deposit the sum involved into court.

Cases referred to:-

(1) *Seah Choon Chye* v. *Saraswathy Devi* [1971] 1 M.L.J. 112, 113.

(2) *United Mining and Finance Corporation Ltd.* v. *Becher* [1910] 2 K.B. 296, 307.

(3) *Burrell* v. *Jones* (1819) 106 E.R. 580, 582.

ORIGINATING SUMMONS.

Wong Chong Wah for the applicant.

A. Jayadeva for the respondent.

Syed Agil Barakbah J.: This is an application by way of originating summons for an order that the respondent, a solicitor in the firm of Syarikat Choe, do forthwith pay the sum of $182,000 to the applicant pursuant to his written undertaking contained in a letter dated March 6, 1974, with interest at 12% per annum from April 16, 1974, till the date of payment and for costs occasioned by this application to be taxed.

After hearing in Chambers, I allowed the application and ordered the respondent to pay to the applicant forthwith the sum stated above as prayed with costs. However, an application was made for the adjournment of the matter into court for further argument under Order 54 rule 22A of the Rules of the Supreme Court. Mr. Wong Chong Wah appeared for the applicant and Mr. Jayadeva for the respondent. Further argument was heard in open court on March 9. 1975. An objection by Mr. Wong for the filing of further affidavit by the respondent was overruled by me on the ground that no fresh evidence was adduced but it explained matters referred to in the earlier affidavit with a view to giving a clearer picture of the issues involved to the court.

In his affidavit the applicant states that at the material time he was the registered owner of all five pieces of land as described at paragraph 2. He entered into a sale agreement with one Andavan s/o Ayapen who on March 6, 1974, assigned the said land to United Realty Sdn. Berhad, the purchaser. In the course of the transaction the respondent in his capacity as solicitor for the purchaser issued a written undertaking dated March 6, 1974, duly received by the applicant (Exhibit D1). The undertaking states as follows: —

"This is to confirm that the sum of Ringgit Three hundred and thirty two thousand seven hundred and ninety two ($332,792) being the balance of the purchase price of the above-said lands has been deposited with us and that the said sum will be released to you upon the transfer of the said lands being duly registered in the name of the purchaser Messrs. Syarikat Alor Merah Sdn. Bhd. or their nominee, nominees or assigns."

The transfer of the said land was registered on April 16, 1974. The respondent paid the sum of $150,000 out of the purchase price of $332,792 to the chargor and a sum of $182,000 was paid to the applicant by cheque No. A.S.B.038801 drawn on the United Malayan Banking Corporation, Berhad, being part payment of the balance of the purchase price due. Payment of the said cheque, however, was stopped by the respondent. (See Exhibit D2 and Exhibit D3 attached to the affidavit — Enclosure (1) in file). Thereafter a series of correspondence ensued between the applicant's solicitors and the respondent's firm. The grounds advanced by both parties as contained in their respective affidavits and correspondence attached form the basis of the arguments before this court. The main issue is whether the respondent is bound to pay the sum of $182,000 on the strength of his written undertaking as a solicitor. The applicant says he is; the respondent says he is not so bound. The applicant proceeds on the ground that the respondent's undertaking is clearly worded as to express his intention of releasing the mentioned sum being the balance of the purchase price deposited with his firm "upon the transfer of the said lands being duly registered in the name of the purchaser Messrs. Syarikat Alor Merah Sdn. Berhad or their nominee, nominees or assigns". On the other hand, the respondent's counsel urged that the undertaking when read together with the agreement of sale and the assignment to United Realty Sdn. Berhad amounts to it being given by mistake in too wide terms and in the circumstances it cannot be enforced in so far as it was mistakenly given. (See *Halsbury's* Laws of England, 3rd Edition, Volume 36, paragraph 226 at page 196). He advanced several grounds as stated in the affidavits that the undertaking should only be released on compliance with other conditions involved, though they are not stated in the undertaking. They are as follows: —

(i) Clause 3 of the agreement of sale between the applicant and Andavan states that "the property sold shall be free from all incumbrances whatsoever". The subsequent deed of assignment by Andavan to United Realty Sdn. Berhad incorporates the agreement aforesaid. The respondent acted as solicitor for the company.

(ii) A transfer was registered on April 6, 1974, with the company acting as nominee of the assignee. However, a *lis pendens* order registered earlier affects the validity of the said transfer and can only be decided upon after the decision of the Federal Court on an appeal against the order which has been lodged.

(iii) A civil suit in which there is a claim for specific performance of a trust and transfer of half undivided share in the said land by one Vesudevan against the applicant is still pending. (C.S. 256/73). Since that is trust property, there will be a resulting trust on the purchaser causing an incumbrance on the said land.

If I were to consider the documents annexed to the further affidavit as stated above, I have to do so on the basis that the respondent had no knowledge of the incumbrances concerning the land in dispute at the time he gave the undertaking on the ground that it was issued by mistake. In his affidavit at paragraph 8 of Enclosure (5), the respondent avers that the applicant has failed to set out all the material facts relating to the acquisition of the said land. He and the company's directors were not aware until now that the said land was incumbered. A careful examination of the matter shows otherwise. The respondent was well aware of the agreement dated August 2, 1973, when he acted as solicitor for the company in the deed of assignment dated March 6, 1974, during which date he issued the undertaking. With regard to the *lis pendens* in paragraph 11 of the same affidavit, the respondent states that the undertaking was given and the cheque sent to the applicant on the assurance of the latter that the said order will be discharged and the title perfected. If that assurance was given, was there any good reason for the respondent to issue the cheque for $182,000 in favour of the applicant after the application to set aside the *lis pendens* was dismissed on March 20, 1974, and three days after the said order was registered in the Registry of Titles on April 20, 1974? He ought to have known that the incumbrance on the said land was still present. The respondent's reason for stopping payment of the said cheque is that he was acting on the instruction of his client.

In relation to the pending civil suit, from record the respondent appeared on behalf of Skrine & Company for the applicant who succeeded in his application for the removal of a caveat filed by Vesudevan in connection with the pending suit on December 20, 1973. In the circumstances, I am of the considered judgment that the respondent cannot succeed on the ground that it was issued by mistake. In his capacity as a solicitor he ought to have guarded himself against those events by embodying the conditions in the undertaking instead of relying "on the assurance of the applicant that the *lis pendens* order will be discharged and the title perfected".

Turning to the legal aspect of this application, there can be no denial that the applicant gave the written undertaking as a stake-holder and not as agent on behalf of his client. It was given by him as a solicitor and in his professional capacity as such and not as an individual. (See my quotation in *Seah Choon Chye* v. *Saraswathy Devi*[1]). It is well known that solicitors have, in the course of their professional practice, given numerous undertakings varying according to

their requirements. Money is entrusted to them under those undertakings largely because they are solicitors and are deemed and found to be especially worthy of trust. (*Per* Hamilton J. in *United Mining and Finance Corporation Ltd.* v. *Becher*[2]). An undertaking given by a solicitor is very often the decisive factor in inducing its acceptance. Great care ought therefore to be paid to the wording of an undertaking both by the solicitor giving it and by the person accepting. It must be clearly worded so as to express the intentions of both parties and this is all the more so when the undertaking is given to a person who is not a solicitor. It is for him to consider the probable effect of such instrument before he signs it for the language of an instrument is to be taken most strongly against the party using it. (*Per* Bayley J. in *Burrell* v. *Jones*[3]). The fact that subsequent to the undertaking events occur which alter the position, such as his client withdrawing or changing his instructions before the undertaking has been honoured, will not entitle the solicitor to avoid liability unless he has expressly guarded against those events in the undertaking itself. The standard required is so high that the courts have allowed only one defence, that of mistake.

Now, turning back to the written undertaking (Exhibit D1), apart from what I have said earlier, the words are plain and unambiguous and does not call for any departure from the ordinary rules of interpretation. The intention is clear. When the undertaking is conditional the condition must be fulfilled before the undertaking will be enforced. Further, he ought to have included words which show clearly that he is not accepting personal liability but merely acting as agent of a particular party in the transaction. As a solicitor the respondent ought to have foreseen the consequences of such failure. He cannot now turn back and say he was acting on the instructions of his client. He is the stake-holder and therefore bound by his undertaking.

With regard to the ground that the appeal on the *lis pendens* order is pending in the Federal Court, I am of the opinion that whatever the decision may be will not directly affect the undertaking in the circumstances.

Although I hold that the respondent is liable for the undertaking and in normal circumstances would order him to pay the purchase money to the applicant as prayed, yet in view of the pending civil action in which the applicant is involved as a defendant on a claim by Vesudevan the plaintiff as legal owner of half undivided share of the said land in dispute and in view of a pending application to institute the purchaser, United Realty Sdn. Berhad, as a co-defendant, I have no alternative but to order the respondent to deposit the sum involved into court forthwith. I do so in the interest of justice and in order to safeguard the interest of the plaintiff should he succeed in his claim. The respondent is ordered to pay costs and interest as prayed; the latter to be deposited together with the sum involved.

Order accordingly.

Solicitors: *Skrine & Co.; Jayadeva & Zahir.*

PUBLIC PROSECUTOR v. ABDULLAH BIN PANDAK HASSAN & ANOR.

[R.Cr.J. (Hashim Yeop A. Sani J.) July 15, 1975]
[Ipoh — Criminal Revision No. 16 of 1975]

Criminal Law and Procedure — Revision — Decision of magistrate — Unclear and confused records — Full punishment awarded — Criminal Procedure Code (F.M.S.) s. 176(i) — Subordinate Courts Act, 1948, s. 87 — Courts of Judicature Act, 1964, s. 37.

The defendant and another had during a period of 12 days committed a number of thefts and one house-breaking in the areas of Titi Gantong, Kampong Sadang and Kampong Talang in the vicinity of Parit in the same District of Kuala Kangsar in the course of which various articles ranging from a parang, shoes, clothing and motor-cycle were stolen either by the said defendant himself or jointly with another.

The learned magistrate dealt with all five charges against the defendant on the same day and imposed the following sentences in respect of each of the offences committed by the defendant:

(a) 2 years' imprisonment and a fine of $100 in default 20 days imprisonment for the first charge.

(b) 2 years' imprisonment for the second charge.

(c) 4 years' imprisonment, 3 strokes of the rotan and police supervision for one year in respect of the third charge.

(d) one year's imprisonment in respect of the fourth charge.

The records of the learned magistrate were either confused or unclear and it did not appear clearly which of the sentences were to run concurrently. The learned magistrate did not record his reasons for imposing the full punishment for the offence nor did he transmit the records to the High Court as required by section 37 of the Courts of Judicature Act, 1964 and section 87 of the Subordinate Courts Act, 1948.

The learned Special President, Ipoh, has brought to the court's attention the sentences imposed on the defendant in Parit Arrest Case No. 14 of 1975 with a view to revision.

Held: (1) despite the fact that magistrates are generally over-burdened in their day-to-day administration of justice, sufficient care must be given to the recording of particulars, facts, statements in mitigation by accused persons, sentences and other orders as the magistrate may make and for this purpose time expended would certainly be regarded as well spent;

(2) the format of the Charge Sheet in the form of "Courts 113" was specially designed to achieve the purpose of clarity and magistrates should ensure that the columns at the back of the charge sheet are properly filled to reflect the full records of the proceedings;

(3) additional continuation sheets should be incorporated into the charge sheet only where the notes of evidence or brief facts and other particulars cannot be entered into the charge sheet by reason of insufficient space;

(4) upon imposing the full punishment by virtue of subsection (2) of section 87 of the Subordinate Courts Act 1948 (Revised 1972) it is mandatory for the magistrate to state his reasons in writing. The said provision requires the magistrate, where no appeal has been lodged against the sentence, to transmit the records of the proceedings to the High Court so that the High Court may satisfy itself as to the correctness, legality or propriety or otherwise of the sentence so imposed in exercise of the special powers;

(5) in the circumstances of this case the sentences imposed must be revised.

Cases referred to:-

(1) *Public Prosecutor* v. *Lim Chai Seng & Ors.* [1956] M.L.J. 236.

(2) *Abdul Wahab* v. *Public Prosecutor* [1970] 2 M.L.J. 203.

CRIMINAL REVISION.

Hashim Yeop A. Sani J.: The learned Special President, Ipoh, has brought to my attention the sentence imposed by the learned magistrate on one Abdullah bin Pandak Hassan in Parit Arrest Case No. 14 of 1975 with a view to revision.